IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION
CIVIL CASE NO. ______________________

Kobe, Mark and John,
Plaintiffs
vs.

Cynthia Mann, Deputy Administrator and Director of the Center for Medicaid, CHIP, and Survey & Certification (CMS), Nikki Haley, in her official capacity as Governor and Chairman of the South Carolina Budget and Control Board; Eleanor Kitzman, in her official capacity as the Executive Director of the State Budget and Control Board; Glenn F. McConnell, in his official capacity as the President Pro Tempore of the South Carolina Senate; Robert W. Harrell, Jr. in his official capacity as the Speaker of the South Carolina House of Representatives, Anthony Keck, in his official capacity as the Director of the South Carolina Department of Health and Human Services, Beverly Buscemi in her official capacity as Director of the South Carolina Department of Disabilities and Special Needs and in her individual capacity, Richard Huntress, Kathi Lacy, Thomas P. Waring and Jacob Chorey, in their individual and official capacities, Mary Leitner, in her official capacity as the Director of the Richland Lexington Disabilities and Special Needs Board; and Judy Johnson, in her official capacity as the Director of the Babcock Center and in her individual capacity.
Defendants.

Complaint

INTRODUCTION

1. This case is brought by Plaintiffs and Class Members who receive Adult Day Health Care Services (ADHC) and other home and community based services because of their severe disabilities.

2. DDSN has notified the Plaintiffs and Class Members and the provider of their ADHC services that SCDDSN intends to terminate those services.

3. ADHC services include professional nursing services, personal care services, social and therapeutic services, medication management and meals.

4. ADHC services for the Plaintiffs and Class Members have been determined by their physicians to be appropriate treatment which is medically necessary, but Defendants intend to terminate these services without giving deference to the opinions of their treating physicians.

5. Upon information and belief, the individual defendants at the South Carolina Department of Disabilities and Special Needs and the Babcock Center have acted in concert to terminate these services as part of a scheme to force Plaintiffs and Class Members into SCDDSN "Work Activity Centers" (WAC's), where they are likely to be financially exploited.

6. ADHC services are being terminated by the Defendants without regard for the health and welfare of the Plaintiffs and Class Members or to the opinions of their treating physicians.

7. CMS, the federal Medicaid agency has determined that ADHC services are cost effective alternatives to institutional services.

8. As a result of the termination of ADHC services and the failure of Defendants to provide other home and community based waiver services, Defendants will actually

increase the costs to state taxpayers because of increased rates of more costly hospitalization and institutionalization.

9. The systemic abuse and neglect of waiver participants in SCDDSN programs and the failure of Defendants to protect vulnerable waiver participants from harm has been documented in two reports written by South Carolina Protection and Advocacy for Persons with Disabilities and in audits issued by CMS, SCDHHS and the South Carolina Legislative Audit Council.

10. Plaintiffs and Class Members request that this Court issue an emergency injunction to prevent Defendants from terminating ADHC services and to protect Plaintiffs from retaliation.

11. Plaintiff Kobe also requests that the Court order Defendants to provide funding for an Assistive Communications Device (ACD) in order for him to communicate his health care needs to his caregivers and his medical professionals and enable him to exercise his civil rights through participation in this lawsuit.

12. This is a fact intensive case which involves allegations of a conspiracy by some of the named individual Defendants to violate the ADA, Section 504 of the Rehabilitation Act, the Medicaid Act and to deny Plaintiffs and Class Members of needed health care and adaptive equipment necessary to live in the most integrated and least restrictive setting.

JURISDICTION

13. This action arises under the Fourteenth Amendment, the Supremacy Clause of the United States Constitution, the Americans with Disabilities Act (ADA)(42 U.S.C. 12101-12213), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794-794a), Title XIX of the Social Security Act (the Medicaid Act) (42 U.S.C. 1396a et seq.) and the Civil Rights Act (42 U.S.C. § 1983 and 1985).

14. Plaintiffs also allege that certain of the individual Defendants have injured and continue to threaten to injure Plaintiffs and Class Members through a pattern of racketeering in violation of RICO (18 U.S.C. §1961 et seq.)

15. This Court has jurisdiction over these matters pursuant to 42 U.S.C. § 1983, 1985, 1988, and 28 U.S.C. § 1331 and 1343.

16. At all times relevant to this action, the Defendants have acted under color of state law in depriving Plaintiffs and Class Members of their rights as set forth herein, some in both their individual and official capacities and some only in their official capacity.

17. As to the claim for injunctive relief, an action at law is not adequate and will not provide full relief.

VENUE

18. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b), because the Defendants operate and perform their official duties in this district and because a substantial part of the events and omissions giving rise to the claims herein contained occur in this district.

PARTIES

The Defendants

Center for Medicaid, CHIP, and Survey & Certification (CMS)

19. The Center for Medicaid, CHIP and Survey and Certification is the agency within the Centers for Medicare and Medicaid Services (CMS) that is responsible for the formulation, coordination, integration, implementation, and evaluation of all national Medicaid program policies. Hereinafter, the Center for Medicaid, CHIP and Survey

and Certification are referred to as "CMS."

20. CMS is responsible for assuring that state Medicaid agencies carry out their responsibilities to protect the health and welfare of Medicaid participants and, as necessary, to correct problems in the administration of Medicaid programs.

21. CMS is responsible for the planning, coordination and implementation of the survey, certification and enforcement programs for all Medicaid providers and suppliers.

22. CMS is responsible for management of Medicaid programs by the states and for oversight of budget and performance issues, including operation of programs to eliminate fraud, waste, and abuse.

23. Cynthia Mann is the Director of the Center for Medicaid, CHIP, and Survey & Certification at CMS and she is sued only in her official capacity.

The Office of the Governor of South Carolina

24. The Governor of South Carolina has the authority to and is responsible for assuring CMS that the State is in compliance with all requirements of the Medicaid Act and the Civil Rights Act as set forth herein.

25. The Governor of South Carolina has sole authority over the Director of the South Carolina Department of Health and Human Services (SCDHHS), including the power to hire and fire its director and to control actions taken by the agency through supervision of the Director of SCDHHS, who is an at-will employee.

26. The Office of the Governor of South Carolina, during the terms of former Governor Mark Sanford, has been on notice of the repeated violations of the Medicaid Act by SCDHHS and SCDDSN and that Office failed to take action to require the agencies to comply with the Medicaid Act when confronted with these violations by

Commissioners of SCDDSN, the former internal auditor of the agency and various state and federal auditors.

27. The Governor is authorized to appoint members of the governing board of SCDDSN and to remove board members from local DSN Boards.

28. The current Governor of South Carolina is Nikki Haley and she is being sued only in her official capacity.

The South Carolina Budget and Control Board (SCBCB)

29. SCBCB is a state entity that is governed by a five-member board chaired by the Governor of South Carolina, Nikki Haley, who is being sued only in her official capacity as Chairman of SCBCB.

30. Eleanor Kitzman is the Director of the South Carolina Budget and Control Board and she is being sued only in her official capacity.

31. SCBCB is responsible for providing regulatory oversight, policy development, monitoring of state finances, purchasing, personnel and real property transactions involving state taxpayer funds and federal funds paid to the state.

32. SCBCB has been responsible for the diversion of millions of taxpayer dollars, which were allocated by the General Assembly for the purpose of providing Medicaid services.

33. Instead SCBCB allowed those funds to be paid instead to the Babcock Center and to DSN Boards for the purchases of real estate which purchases were wasteful of taxpayer dollars and which has actually created barriers to competition by private providers.

34. SCBCB has failed to monitor use of funds by SCDHHS, SCDDSN and the Babcock

Center and to assure that funds allocated by the General Assembly are spent as intended by the Legislature.

The South Carolina General Assembly

35. Glenn McConnell is the President Pro Tem of the South Carolina Senate and he is being sued only in his official capacity.

36. Robert Harrell is the Speaker of the South Carolina House of Representatives and he is being sued only in his official capacity.

37. The General Assembly is empowered to redress grievances and to make new laws, as the common good may require. Article III, Section 1 of the South Carolina Constitution.

38. Article III, Section 31 of the South Carolina Constitution provides that lands under the control of the State may never be donated, directly or indirectly, to private corporations or individuals, nor sold to corporations, or associations, for a less price than that for which it can be sold to individuals.

39. The General Assembly has the duty and authority to appropriate money as necessary for the operation of the agencies of government and has the right to specify the conditions under which the appropriated monies shall be spent. *State ex rel. Condon v. Hodges,* 349 S.C. 232, 244, 562 S.E.2d 623, 631 (2002); *Gilstrap v. S.C. Budget and Control Bd.,* 310 S.C. 210, 216, 423 S.E.2d 101, 105 (1992) (noting that the appropriation of public funds is a legislative function); *Clarke v. S.C. Pub. Serv. Auth.,* 177 S.C. 427, 437, 181 S.E. 481, 484 (1935) (noting that the General Assembly has full authority to make appropriations as it deems wise in absence of any specific constitutional prohibition against the appropriation).

40. The power of the General Assembly includes the duty to authorize and/or appropriate

the use of all federal funds. S.C.Code Ann. § 11-11-160 (Supp.2008).

41. Federal funds must be deposited into the state treasury and allocated in the annual appropriations bill. S.C. Code Ann. § 2-65-20 (2005) (requiring the General Assembly to "appropriate all anticipated federal and other funds for the operations of state agencies in the appropriations act"); S.C. Code Ann. § 11-13-45 (Supp. 2009) ("All federal funds received must be deposited in the State Treasury, if not in conflict with federal regulations, and withdrawn from the State Treasury as needed....").

42. The General Assembly must include any conditions on the expenditure of those funds, consistent with federal laws and regulations. S.C.Code Ann. § 2-65-20 (2005).

43. Money may be drawn from the treasury only pursuant to appropriations made by law. S.C. CONST. art. X, § 8.

44. The General Assembly has continued to elect to pay the state matching funds for Medicaid programs operated by SCDDSN to that agency, instead of paying these funds to SCDHHS, which is accountable to CMS for the expenditure of all Medicaid funds (state and federal).

The South Carolina Department of Health and Human Services (SCDHHS)

45. SCDHHS is the State Medicaid Agency which is solely responsible to CMS for the administration of all Medicaid programs in South Carolina.

46. SCDHHS has delegated to SCDDSN the day to day operations of the MR/RD and HASCI Medicaid waiver programs, but federal law prohibits SCDHHS from delegating any authority to establish regulations, rules or policies related to Medicaid programs it administers.

47. SCDHHS has the authority to amend the waiver programs operated by SCDDSN so

as to require providers to bill SCDHHS directly, rather than requiring private providers to bill their competitors, the Babcock Center and local DSN Boards.

48. SCDHHS has the authority to prevent SCDDSN from paying local DSN Boards and the Babcock Center prospectively for Medicaid services, while discriminating against private businesses like Hope Bridge and Helping Hands, which must wait for payment from their competitors after the services are provided.

49. Anthony Keck is the director of SCDHHS and he is being sued only in his official capacity.

The South Carolina Department of Disabilities and Special Needs (SCDDSN)

50. SCDDSN is responsible, under contract with SCDHHS, for the day-to-day operation of Medicaid waiver programs in the State for persons who have mental retardation and related disabilities.

51. Although SCDDSN administers the day to day operations of the MR/RD Medicaid waiver program for SCDHHS, federal regulations prohibit it from having the authority to establish policies, rules or regulations for the operation of that program.

52. Beverly Buscemi is the director of SCDDSN and she is being sued in both her official capacity and Plaintiffs allege that her individual capacity and her participation in the scheme alleged herein has been willful and intentional.

53. As a PhD psychologist, Defendant Buscemi is personally knowledgeable about the psychological harm caused by the threats of terminating the ADHC services of Plaintiffs and Class Member and she was knowledgeable about the history of abuse, neglect and exploitation in existing Babcock Center WAC's when she requested an

additional $200,000.00 to fund a new workshop for that organization, thus placing more persons who have disabilities at unnecessary risk of harm.

54. Dr. Buscemi has continued to treat the Babcock Center as a local DSN Board pursuant to an informal and illegal agreement to "grandfather" the organization and has continued to pay capitated payments to the Babcock Center despite personal knowledge of its mismanagement of funds and the fact that the Babcock Center is not a public entity, which is a statutory requirement to be a local DSN Board.

55. Richard Huntress is the Chairman of the Board of the SCDDSN Commission, which is the governing board of the agency that is appointed by the Governor and he is being sued in both his official capacity and his individual capacity.

56. Kathi Lacy is the Associate State Director for Policy at SCDDSN who was trained as a nurse and she is being sued in both her official capacity and her individual capacity.

57. Defendant Lacy is knowledgeable about the extent of the abuse and neglect of persons who attend Babcock Center WACS and her participation in this scheme has been willful and intentional.

58. Thomas P. Waring is currently the Associate State Director for Administration who has served as the "Accounting/Fiscal Manager" for SCDDSN and he is sued in both his official capacity and his individual capacity because his participation in this scheme has been willful and intentional.

59. Jacob Chorey is the MR/RD Medicaid Waiver Coordinator at SCDDSN and he is being sued in both his official capacity and his individual capacity and his participation in the scheme alleged herein has been willful and intentional.

The Babcock Center

60. The Babcock Center is a private corporation which provides services to persons who have mental retardation and related disabilities primarily in Richland and Lexington Counties.

61. Although DDSN "grandfathered" the Babcock Center as a local DSN Board (Disabilities and Special Needs Board), because it is a private corporation, the Babcock Center does not meet the statutory requirements under South Carolina Code of Laws 44-20-375 to be a local DSN Board.

62. The Richland Lexington Disabilities and Special Needs Board is the local DSN Board in Richland and Lexington Counties whose members are appointed by statute.

63. The Babcock Center operates private WAC's that compete with Helping Hands, the program Plaintiffs and Class Members attend, for MR/RD Medicaid funding.

64. Because SCDDSN has designated the Babcock Center as the "fiscal intermediary" for Richland and Lexington Counties, the Babcock Center receives most Medicaid payments for waiver participants in those counties.

65. Judy Johnson is the director of the Babcock Center and she is being sued in both her official capacity and her individual capacity because her actions have been willful and intentional.

The Richland Lexington Disabilities and Special Needs Board

66. Richland Lexington Disabilities Board is the local DSN Board for Richland and Lexington Counties and is responsible for the planning and administration of programs for persons who have mental retardation and related disabilities in Richland and

Lexington Counties.

67. Upon information and belief, the Richland Lexington Disabilities and Special Needs Board was instructed by Kathi Lacy to terminate ADHC services for persons who had been determined by their treating physicians to be eligible for those services.

68. Mary Leitner is the director of the Richland Lexington Disabilities and Special Needs Board and she is being sued only in her official capacity.

The Plaintiffs

69. The Plaintiffs are persons who have severe disabilities who require ADHC services to maintain their health and to function with the most independence possible.

Class Allegations

70. The Plaintiffs bring this action on behalf of themselves and the class of MR/RD Medicaid waiver participants who are receiving ADHC services from SCDDSN but are at risk of those services being terminated due to reevaluation of eligibility under the direction of Defendant Kathi Lacy.

71. The prerequisites of Federal Rule of Civil Procedure 23(a) are satisfied.

72. The size of the class is so numerous and the geographic diversity of class members is so wide as to make joinder of all class members impracticable.

73. In December 2010, Defendant Lacy personally reviewed “hundreds” of waiver participants receiving ADHC services at the request of Defendant Judy Johnson and she determinated that the authorizations for these services were “excessive.”

74. Defendant Lacy and other persons who are reconsidering the eligibility of persons attending ADHC’s are prohibited by the South Carolina Medicaid Practice Act from

making medical treatment decisions.

75. DDSN has caused notices of termination of ADHC services to be sent to the Plaintiffs and Class Members via United States Mail, informing them that they no longer qualify to receive ADHC services or that their continued receipt of these services is being reviewed.

76. Due to the costs of litigation, the fact that Plaintiffs and Class Members are impoverished, and to the effects of their combined disabilities, including mental retardation and/or severe physical disabilities, the majority of the Class Members are unable to institute individual actions.

77. There are questions of law and fact common to the class, including, but not limited to: (1) whether Defendants' termination of ADHC services violates the ADA, Section 504 and the Medicaid Act; (2) whether Defendants have improperly spent funds intended to provide appropriate treatment (as determined by physicians) purchasing real estate instead in order to unfairly benefit the Babcock Center and local DSN Boards in violation of the ADA and Section 504; (3) whether Defendants are illegally perpetuating the discrimination against persons who choose to receive waiver services from private providers in violation of their right to choose from all qualified providers of Medicaid waiver services; (4) whether Defendants violate Title XIX of the Social Security Act by failing to provide adequate, appropriate, and needed Waiver-covered services to class members; and (6) whether Defendants have the necessary safeguards in place to protect the health and welfare of individuals in the Waiver who are currently receiving ADHC services.

78. Some of the Class Members were neglected, abused or exploited while attending

SCDDSN WAC programs and at least one Class Member was sexually abused there.

79. Plaintiffs' claims are typical of the claims of the class members, in that they involve Medicaid waiver participants who receive ADHC services through a waiver administered by SCDDSN.

80. The Plaintiffs will fairly and adequately protect the interests of the class. They have no interests adverse to or in conflict with those of other class members.

81. Class counsel is experienced in Medicaid and ADA litigation and the waiver programs administered by SCDDSN and DHHS. *Ex Parte: South Carolina Department of Health and Human Services v. State Farm Mutual Automobile Insurance Company v. Justin Jackson; Paul M. Jackson, III, Tesa K. Jackson, Joseph Rakes, and Nikkia Rakes*. 364 S.C. 527; 614 S.E.2d 609, *Doe v. Kidd I*, 501 F.3d 348 (4th Cir. 2007), *cert.* denied, 128 S. Ct. 1483 (2008); *Doe v. Kidd II*, 10-1191, 2011 WL 1058542 (4th Cir. Mar. 24, 2011); *Brown v. DHHS*, ___ S.C. ____, (S.C. Ct. App. April 20, 2011).

82. This action should proceed as a class action under Federal Rule of Civil Procedure 23(b)(2).

83. Defendants have acted or refused to act on grounds generally applicable to all members of the class, making final declaratory and injunctive relief appropriate with respect to the class as a whole.

The Plaintiffs

Kobe[1]

[1] The names of the Plaintiffs have been changed due to fear of retaliation.

84. Kobe is a handsome 29 year old man who is able to understand and express his wishes and who has a wonderful personality and many friends at Hope Bridge Adult Day Health Care program.

85. Kobe brings this action in his individual capacity.

86. Kobe is severely physically disabled and he is not able walk or to speak.

87. Kobe's physician determined that he requires ADHC services and he has attended Hope Bridge Adult Day Health Care program for many years.

88. Kobe is at risk of death from choking if his food is not properly prepared and served to him, because he is unable to feed himself and is unable to swallow food that is not prepared as ordered by his physician.

89. The Babcock Center has a history of persons under its care choking or dying from aspiration-related illnesses due to its failure to properly monitor food consumption in its programs, including its WAC's.

90. Kobe's arms and legs must be strapped to his wheelchair because of his spasticity and he is unable to speak.

91. Because SCDDSN and SCDHHS have failed to provide Kobe with an augmentative communications device (ACD), he is unable to inform his caregivers of changes in his condition which may be life threatening and require prompt medical treatment.

92. Kobe needs an ACD to become more integrated into the community and to be able to move to a more independent residential setting.

93. Kobe is at risk of serious injury or death if he were to be forced to attend the day program proposed by the Defendants because he would be totally unable to defend

himself from assaults, which are not uncommon at Babcock Center WAC's.

94. The Babcock Center has failed to keep Kobe's wheelchair in proper operating condition and he has missed many days of ADHC because of the failure to repair his wheelchair.

95. When his wheelchair is broken, Kobe is confined to his group home and spends most of his time in the bed.

96. Recently, Kobe was kept out of Hope Bridge ADHC for approximately two weeks because his wheelchair was broken and during that time he spent most of that time in his bed.

97. The Babcock Center benefits financially when Kobe is kept away from Hope Bridge, because his ADHC services are funded through the "capitated" rate paid to the Babcock Center and funds not spent on waiver services can be spent at the discretion of the Babcock Center.

98. Due to his severe physical disability, Kobe is unable to participate in any meaningful manner in work activities at a WAC.

99. Kobe considers the participants and staff at the ADHC he attends (Helping Hands) to be his family and the staff there are important supports to him to assure that his physical and psychological needs are met.

100. Kobe requires total care when he is changed and it takes more than one person to safely lift him out of his wheelchair due to his spasticity.

101. Upon information and belief, the Richland Lexington Disabilities and Special Needs Board sent a letter via United States Mail to Kobe at his group home informing him

that he was no longer eligible for ADHC services, but Babcock Center staff there failed to deliver the letter to him.

102. Staff at Kobe's Babcock Center group home have diverted other communications sent to him by U.S. Mail.

103. Kobe first learned from staff at Hope Bridge that SCDDSN sent a termination notice for his ADHC services there.

104. Upon information and belief, DDSN decided to terminate Kobe's ADHC services without consulting his treating physician, who has determined that these services are medially necessary.

105. Kobe is terrorized at the thought of being forced to attend a WAC.

106. Kobe would be subjected not only to risk of physical and sexual abuse, but also to monotony and psychological stress at a WAC if his funding for ADHC is terminated.

107. Kobe would like to move from the group home where he lives into an apartment, but the January 1, 2011 reductions in MR/RD Medicaid waiver services and the method Defendants use to fund less restrictive placements prohibit him from moving to an apartment.

108. The cost of Kobe receiving services in a supervised apartment setting would be less than the cost of his being served in an ICF/MR, which SCDDSN has determined that he qualifies for and has the right to receive. (An ICF/MR is a nursing facility for persons who have mental retardation or a related disability and it is the most restrictive and most expensive setting in which services are provided by SCDDSN.)

109. Defendants have never informed Kobe of his right to choose a different service

coordinator or to live in the community with residential supports provided by a provider other than the Babcock Center.

110. Kobe is fearful of retaliation for exercising his civil rights not to be sent to a WAC

111. Kobe has not been provided the adaptive equipment he needs because of the financial incentives of the Babcock Center to withhold funds for equipment he needs.

112. Kobe is at risk of institutionalization or hospitalization, even death from choking, if he is forced to attend a WAC.

113. Kobe requests that this Court order the Defendants to provide ADHC and other support services he needs to move to an apartment.

114. Kobe requests the protection of the Court from retaliation for exercising his civil rights.

Mark

115. Mark is a 41 year old who has Down Syndrome and he functions at the level of a two year old.

116. Mark brings this action through his court-appointed guardian, who is his sister.

117. Mark is nonverbal and he has self-abusive behaviors.

118. Mark self-mutilates himself by excessively scratching and picking at his arms, which can lead to infection if his condition is not monitored and this behavior is exacerbated when he is afraid or feels threatened.

119. Mark requires assistance when he goes to the bathroom, because he is unable to clean himself.

120. Because of his vulnerabilities, Mark would be at risk of harm and unable to defend himself at a WAC.

121. Mark's physician has ordered that he needs ADHC services.

122. When Mark's father died, he moved into the home of his sister, who works and is raising three of her own children, but she has no legal obligation to take Mark into her home and could, at any time, elect for him to receive services in a more expensive ICF/MR.

123. If adequate services and supports are not provided to Mark in his sister's home and she elected not to take care of him, the State would be obligated to provide ICF/MR services "with reasonable promptness," which has been determined by the federal courts to be within 90 days.

124. In the interim, SCDDSN would be obligated to provide ICF/MR respite costing $270.00 per day, which is significantly more than the cost of the ADHC and respite services Mark has requested.

125. On January 1, 2010, SCDDSN reduced the number of respite hours Mark receives by more than two-thirds by falsely claiming these cuts to be unavoidable because of severe "state budget reductions."

126. However, soon after announcing these reductions, SCDDSN transferred $1 million to the Babcock Center for the purchase of a new WAC.

127. SCBCB approved the transfer of $800,000.00 of these funds to the Babcock Center, which is a private corporation treated by SCDDSN as if it were a local DSN Board.

128. These funds were transferred, along with $1.6 million to two DSN Boards, knowing

that MR/RD waiver services would be slashed a on January 1, 2010 because of what now appear to be false claims of budget reductions.

129. No member of the SCBCB asked why these excess funds were not being used instead to provide $3.6 million of MR/RD Medicaid waiver services to prevent those cuts.

130. The opening of this Babcock Center WAC conveniently coincides with the notice of termination of Mark's ADHC services.

131. Mark's sister was not informed that even under the new rules that went into effect on January 1, 2010, Mark could still receive up to 240 hours per month of respite services.

132. Mark's sister was never informed about adult companion services or personal care services which are MR/RD Medicaid waiver services that would help her to keep Mark at home and prevent him going to an institution.

133. During 2010, Mark's sister was informed that she would have to become the legal "employer" of Mark's respite caregiver in order for him to continue to receive those services, but it was not explained to his sister that this shifting of costs could place her at risk of claims by respite caregivers for liability, unemployment or workman's comp.

134. Under the rules that went into effect on January 1, 2010, SCDDSN will provide an unlimited number of days of respite in a significantly more expensive ICF/MR operated by SCDDSN or a local DSN Board.

135. When SCDHHS and SCDDSN amended the waiver effective January 1, 2011, the amendment increased the rate paid for ICF/MR respite services $157 per day to $270 per day.

136. Mark is a wanderer and he would be unable to tell anyone his name, phone number or address if he got lost, so he requires constant attention.

137. Mark's favorite part of the day is going to Hope Bridge and he is delighted when the bus arrives at his sister's house to take him there.

138. Mark's MR/RD Medicaid waiver services living at his sister's home cost less than one-half the cost of his care in an institution.

139. Mark's sister is fearful that he could suffer reprisals for appealing the termination of his ADHC services.

140. Mark's sister wants to be able to continue to keep him at her home, but she will be unable to do so if his ADHC services are not restored.

141. Mark requests that this Court immediately restore his respite hours to 240 per month because he is at immediate risk of institutionalization if his sister is not provided with the supports and services that he needs.

142. Mark's sister is fearful of his safety if he has to move to an ICF/MR or to attend a WAC because of the high rate of abuse, neglect and exploitation at these facilities and Mark's inability to protect himself.

John

143. John is an attractive 21 year old man who looks exactly like his father.

144. John brings this action through his father, who is his court-appointed guardian.

145. John has severe autism and he moved into a group home a few years ago, when his parents could no longer take care of him at home because of the limited support and limited home-based services they received from SCDDSN.

146. John requires assistance with buttoning his pants and buckling and unbuckling his belt. He must be supervised in toileting because when he has a bowel movement, he will smear feces if not supervised.

147. If not supervised, John will put his shoes on the wrong feet, his clothes on backwards or inside out, and his legs in the sleeves of his shirt, etc.

148. John has no fear of dangerous situations, such as cars when crossing the street. He also has no fear of strangers and will often go up to people he does not know, placing him at risk of exploitation and abuse.

149. John has received ADHC services at Hope Bridge for more than three years and these services were ordered by his treating physician.

150. On January 5, 2011, a notice that his eligibility for ADHC services was sent to John, who cannot read or write, instead of sending the notice to his legal guardians.

151. On January 21, 2011, John's physician ordered ADHC services because he "requires daily monitoring/observation and assessment due to an unstable (not managed by routine medications and likely to change rapidly) medical condition which may include overall management and evaluation of medical care plan which changes daily or several times a week."

152. According to John's treating physician, he requires daily skilled monitoring for observation for conditions that "do not ordinarily require skilled care, but because of the combination of conditions, may result in special medical conditions."

153. Upon information and belief, there has been no change in John's condition to warrant termination of ADHC services and his treating physician was not consulted before

SCDDSN issued its decision to terminate his services.

154. On April 21, 2011, without contacting John's treating physician who ordered ADHC services, his SCDDSN service coordinator signed a "Notice of Termination of Service" stating that his ADHC services were being terminated because of "Change in need; no longer justifies original request."

155. John's IQ is below normal and his speech is intelligible only to those persons who know him.

156. John requires total assistance with bathing and dressing, brushing his teeth and other grooming tasks, such as putting on deodorant.

157. John can feed himself, but he requires someone to cut up his food and he must be monitored while he eats.

158. John is at risk of choking because he stuffs his food in his mouth and requires constant supervision while eating.

159. John has a medical disorder called pica, which causes him to eat paper, cardboard and even feces. He eats his clothing, materials lying around on tables, buttons, nuts and bolts and coins.

160. In addition to the risk of poisoning, John is at a much greater risk of gastro-intestinal obstruction or tearing in the stomach due to ingestion of foreign substances.

161. In 2002, a young man who attended a Babcock Center WAC died from an intestinal obstruction after eating twelve inches of saran wrap at the workshop and John would be placed at similar risk if he were forced to attend a WAC without adequate supervision which is provided at Hope Bridge.

162. Another risk of pica is the ingestion of animal feces and accompanying parasites.

163. Because of the lower levels of staffing at the WAC, John would be at significant risk of injury or death due to his risk of choking and swallowing hazards if he were forced to attend a workshop.

164. The Babcock Center has a history of persons under its care choking or dying from aspiration related illnesses due to its failure to properly monitor persons with choking risks.

165. Regardless of the provider of any non-medical day activity program he might attend, John's needs cannot be safely met without the close supervision provided at a ADHC center.

166. John has a very limited number of activities he enjoys and the ADHC program he attends at Helping Hands gives him the opportunity to socialize and get out of the house in a safe and fun-filled environment where he is accepted, valued and loved.

167. When John has been prevented from attending his ADHC center, his negative behaviors increase.

168. John's parents were informed that dental services will no longer be provided by Medicaid. He must be placed under general anesthesia for dental procedures and this would place a significant financial burden on his family.

169. John's family is concerned about reports of retaliation against persons who challenge decisions made by SCDDSN and the Babcock Center and request this Court's protection during these proceedings.

FACTUAL BACKGROUND

The Purpose of the DDSN Medicaid Waiver Programs

170. The purpose of the MR/RD and HASCI programs is to provide an array of services in the community to prevent waiver participants from being institutionalized or hospitalized.

171. CMS is the federal agency authorized by Congress to administer all Medicaid programs and the federal government matches each dollar provided by the state with approximately four federal dollars, to create a 20%/80% match of state funds.

172. States are not obligated to participate in Medicaid waiver programs, but once they accept federal Medicaid funding, they must comply with all state and federal statutes, rules and regulations.

173. CMS is the federal agency responsible for assuring that states comply with Medicaid laws, rules and regulations in return for the federal financial contribution.

174. South Carolina has elected to participate in the MR/RD Medicaid waiver program, which "waives" the requirement that participants who have mental retardation or related disabilities live in institutional settings.

175. Some MR/RD Medicaid waiver participants live at home and others live in residential programs, such as in group homes in the community.

176. In order to qualify for the MR/RD Medicaid waiver program, participants must meet the level of care requirements to receive Medicaid-funded institutional services in a nursing home or an ICF/MR (which is a nursing home specifically for persons who have mental retardation or a related disability).

177. Federal law requires that SCDHHS must give waiver participants not only the choice

between receiving services in an ICF/MR or a community setting, but also that they must be provided to receive waiver services from the qualified provider of their choice.

178. SCDDSN and SCDHHS have certified to CMS that all of the Plaintiffs and the Class Members would require services in an ICF/MR if MR/RD Medicaid waiver services are not provided to them.

179. SCDHHS has contracted with SCDDSN to administer the MR/RD Medicaid waiver program in South Carolina, but SCDHHS remains fully accountable to CMS for the operation of the program.

180. SCDDSN and its local DSN Boards operate "Work Activity Centers" (WAC's) which SCDDSN has described as "blended component units" of SCDDSN and they share the profits made off of persons who have severe disabilities.

181. The Babcock Center and local DSN Boards operate WAC's, which have been purchased with funds provided primarily by SCDDSN.

182. These WAC's compete directly with Adult Day Health Care programs to provide day services.

183. The staffing ratios at WAC's is less than that of ADHC centers.

184. SCDDSN has ordered the termination of ADHC services for profoundly disabled persons in Richland and Lexington Counties and, upon information and belief, is in the process of terminating these services of profoundly disabled persons across the State whose treating physicians have determined that these services are medically necessary.

185. ADHC services are being terminated in Richland and Lexington Counties as part of a scheme to increase attendance at the Babcock Center WAC's because of financial difficulties encountered by the Babcock Center and are in the process of being terminated in other counties to maintain the monopoly and control of local DSN Boards.

186. The timing of the termination of the ADHC services of Plaintiffs' and Class Members who live in Richland and Lexington counties coincides conveniently with the opening of a new WAC which SCDDSN purchased for the Babcock Center with the approval of members of the SCBCB.

187. Spending taxpayer dollars to purchase this and other WAC's has been an unnecessary waste of funds, because private providers of ADHC services have been willing to provide day program services to Plaintiffs and other Class Members without state funding to purchase facilities.

188. Although treating physicians of the Plaintiffs and Class Members determined that ADHC services are medically necessary, Kathi Lacy and her assessment team, none of whom are qualified under the South Carolina Medical Practice Act to make medical decisions, made determinations that they do not qualify for ADHC services in furtherance of this scheme.

189. Private providers of ADHC services compete directly with WAC's which have been purchased with taxpayer dollars.

190. Although federal law requires SCDHHS to allow private providers to bill SCDHHS directly for the Medicaid services, SCDDSN has illegally instructed two or more

ADHC centers, Helping Hands and Hope Bridge, that they have no choice but to bill their competitor, the Babcock Center for their services.

191. In furtherance of the scheme to increase attendance at the Babcock Center WAC and in order to financially benefit SCDDSN and the Babcock Center, Defendants Beverly Buscemi, Kathi Lacy, Judy Johnson, Jacob Chorey and others who determined that Plaintiffs and Class Members are no longer qualify to receive ADHC services, but they failed to inform the affected persons or their families of feasible alternatives other than the WAC's, such as companion, nursing and personal care attendant services.

192. If their ADHC services are terminated, Plaintiffs and Class Members will be placed at imminent risk of institutionalization, hospitalization, injury or death.

193. Defendants' actions violate the Americans with Disabilities Act (ADA)(42 U.S.C. 12101-12213), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794-794a), Title XIX of the Social Security Act (the Medicaid Act) and the Supremacy Clause of the United States Constitution.

194. The Defendants who are sued herein in their individual capacities have intentionally violated the rights of Plaintiffs and Class Members with deliberate indifference to their federally protected rights, thus placing them at risk of serious harm or death.

195. Members of the South Carolina Budget and Control Board have violated the rights of Plaintiffs and Class Members by permitting the Defendants to transfer state funds needed to pay for appropriate services (from private providers in the least restrictive setting) to the Babcock Center and local DSN Boards for the purchase of real estate instead.

196. The SCBCB transferring millions of dollars of "excess funds" to purchase WAC's has resulted in unfair competition and has threatened the very viability of small, local businesses, such as Hope Bridge in Lexington County.

197. Actions taken by Defendants in favor of local DSN Boards and the Babcock Center have adversely affected the rights of Plaintiffs and Class Members to receive appropriate services in a safe and secure environment.

198. Individual Defendants Buscemi, Huntress, Lacy, Waring, Chorey, Johnson and other persons who will be identified during discovery have also violated the Racketeer Influenced and Corrupt Organizations Act ("RICO") 18 U.S.C. §1961 et seq. by conducting an enterprise through a pattern of racketeering activity.

Diversion of Funds Paid to DDSN and SCDHHS

199. On October 1, 2009, the South Carolina Department of Health and Human Services informed CMS, the federal Medicaid agency, that it was being forced to drastically reduce services offered under the Medicaid waiver programs administered by SCDDSN because of severe budget reductions.

200. At the time this request to amend the MR/RD Medicaid waiver was made, SCDDSN and SCDHHS were receiving hundreds of millions of federal stimulus dollars which were being diverted to a rainy day fund instead of being used to preserve services Plaintiffs and Class Members need to remain in the least restrictive setting.

201. SCDHHS falsely informed CMS during FY 2010 that this amendment was necessitated "due to the State of South Carolina's budget situation," when, according to the State Comptroller, Defendants caused more than $225 million, or nearly 1/4 of

the funds allocated to SCDHHS for that fiscal year to "lapse."

202. Despite knowledge that SCDHHS had not spent federal Medicaid stimulus funds as Congress intended, CMS failed to take action to require South Carolina to spend those funds providing services and, instead, authorized SCDHHS to reduce services to persons with severe disabilities

203. At the start of FY 2010, the State General Reserve Fund was empty, but by the start of FY 2011, this Reserve Fund held nearly $160 million and SCDHHS was the only agency to have "lapsed" funds which could have bee used to replenish the General Reserve Fund.

204. According to information SCDHHS submitted to the SCBCB, more than $500 million in funds allocated to SCDDSN by the General Assembly since FY 2009 has been diverted from Medicaid services to other uses.

205. According to Emma Forkner, the former director of SCDHHS, these funds were allocated to SCDHHS by the General Assembly, then redistributed for other purposes.

206. The SCBCB, the Governor's Office, SCDHHS and CMS have failed to oversee the proper use of Medicaid funds in South Carolina, as is evidenced by the fact that none of these agencies that are responsible for assurance that Medicaid funds are spent in compliance with federal law noticed when $5.2 million of Medicaid funds paid to SCDSS were embezzled.

207. According to former director of SCDHHS, Emma Forkner, her auditors determined that the $5.2 million of Medicaid funds that were embezzled from SCDSS were "appropriately spent."

208. Despite knowledge of the failure to oversee the expenditure of these funds and more than $20 million spent on real estate without authorization from the governing board of SCDDSN, as reported by the South Carolina Legislative Audit Council, CMS authorized SCDHHS to reduce and eliminate services which waiver participants need to live in the least restrictive setting.

209. None of these agencies followed up effectively on the findings of the South Carolina Legislative Audit Council showing that significant barriers exist which prevent private companies, like Hope Bridge and Helping Hands, from competing with DSN Boards and SCDDSN to provide MR/RD Medicaid waiver services.

210. Instead, SCBCB, the Governor's Office, SCDHHS and CMS have continued to allow the diversion of millions of dollars of taxpayer funds to purchase real estate used by DSN Boards (and "grandfathered" DSN Boards, like the Babcock Center) as WAC's.

211. Former Director of SCDHHS, Emma Forkner, and the former Governor's Chief of Staff, Scott English, have provided a Senate Committee with conflicting reports about the expenditure of Medicaid funds and why DHHS now claims to be operating at a deficit, when the State Comptroller reported in August 2010 that SCDDSN allowed more than $225,000,000 to "lapse" during FY 2010.

212. Emma Forkner informed CMS during FY 2010 that reductions to the MR/RD Medicaid waiver program were unavoidable because of reductions in state funding.

213. Upon information and belief, at the time when Ms. Forkner was telling CMS that South Carolina did not have funds to maintain waiver services, her agency and SCDDSN had received, and they were continuing to receive hundreds of millions of

dollars in federal Medicaid stimulus funds.

214. Those funds were being diverted by Defendants to a rainy day fund instead of being used for the intended purpose of maintaining services needed to prevent institutionalization of waiver participants.

215. When SCDHHS informed CMS that the January 1, 2010 reductions were unavoidable due to budget reductions, SCDDSN was, in addition to holding in an "excess funds account" more than $30 million in federal Medicaid stimulus funds, holding $7.8 million of unobligated funds.

216. These "excess funds" could have been used instead to avoid reductions in SCDDSN Medicaid waiver services instead of being used to buy WAC's in order to increase profits of SCDDSN and its local DSN Boards.

217. If these "excess funds" had been matched with federal funds to provide Medicaid waiver services, each dollar would have produced four federal dollars to produce home-and-community based waiver services and thousands of jobs across the state.

218. Instead, within two weeks of informing CMS that waiver services must be reduced because of a lack of funds, the interim director of SCDDSN, Andy Laurent wrote to the South Carolina Budget and Control Board requesting permission to transfer $800,000 of these excess funds to the Babcock Center to purchase a WAC.

219. In addition, he requested permission to transfer $1.6 million of these "excess funds" to buy WAC's for the Horry County DSN Board and the Beaufort County DSN Board and to pay up to $100,000 for "consulting" services.

220. The consultant who was awarded this contract is a former director of DHHS.

221. As a result of the expenditure of these state funds used to purchase real estate, the State of South Carolina lost more than $10 million in matching federal Medicaid funds, which would have been available if the funds had been used to provide Medicaid waiver services instead of being used to purchase real estate.

222. As part of the agreement with SCBCB, more than $3 million of these excess funds (not the federal stimulus funds, which were paid to a rainy day account), which had been paid to SCDDSN to provide services for persons who have disabilities, were paid to the SCBCB as *quid pro quo* for granting permission to spend $2.6 million buying more real estate.

223. The cost of these three properties was more than the deficit which SCDDSN claimed to have which it told CMS necessitated drastic reductions to the MR/RD Medicaid program.

224. SCDDSN and SCDHHS amended the MR/RD Medicaid waiver without performing an economic analysis or taking into consideration the cost of alternative services which have been required when other services were reduced, such as increased WAC services, and CMS did not require those agencies to perform any such analysis or any assessment by a physician to determine medical necessity.

225. After approving the reductions in MR/RD Medicaid waiver services, and before the reductions were implemented on January 1, 2010, the South Carolina Budget and Control Board voted to allow DDSN to spend more than $2.6 million purchasing WAC's.

226. In November, 2009, the governing board of DDSN voted to give the Babcock Center

and additional $200,000 to purchase the new WAC, increasing the total amount for this WAC to $1 million.

227. The termination of the ADHC services of waiver participants living in Richland and Lexington Counties was timed to coincide with the opening of the Babcock Center WAC which was purchased with $1 million in taxpayer funds ($800,000.00 approved by the SCBCB and an additional $200,000.00 authorized in November 2009 by the governing board of SCDDSN.)

228. Upon information and belief, Defendants have never provided capital funds to the ADHC programs attended by Plaintiffs and Class Members, or to any non-DSN Board to purchase buildings to be used for ADHC services.

229. The Babcock Center is a private corporation which competes with other private entities in Richland and Lexington Counties that provide adult day health care services.

230. SCDDSN gives the Babcock Center preferential treatment as if it were a local DSN Board, such as paying the Babcock Center prospectively, while ADHC providers must provide the waiver services first, then submit bills for reimbursement to the Babcock Center.

231. DDSN has spent tens of millions of dollars allocated for Medicaid waiver services purchasing WAC's for local DSN boards and the Babcock Center in order to prevent competition by private ADHC providers and other non-governmental providers of services.

232. ADHC providers must pay for capital costs out of the $45 per day reimbursement paid

by Medicaid, but DSN Boards are paid $45.50 per day to provide WAC services, even though the capital costs having already been paid by taxpayers, over and above the Medicaid reimbursement they receive for the service.

Evidence of the Scheme to Establish Barriers to Competition by Purchasing WAC's

233. Since the full implementation of capitated funding in 2001, SCDDSN has transferred millions of dollars to the Babcock Center by forgiving debt owed to SCDDSN and purchasing real estate.

234. During FY 2002, DDSN paid the Babcock Center $1.3 million for "vacant beds" and it overpaid the Babcock Center for other services by $195,767.

235. During FY 2002, the rate of substantiated cases of abuse, neglect and exploitation of clients of the Babcock Center was double the statewide average.

236. During FY 2003, the Babcock Center received a "capital grant" from DDSN in the amount of $750,000, but the Babcock Center spent only $220,464 of these funds and returned $529,536 back to DDSN.

237. During FY 2003, DDSN overpaid the Babcock Center for other services by $899,673.

238. During FY 2004, the Babcock Center received another "capital grant"from DDSN in the amount of $750,000, but again, the Babcock Center spent only $220,464 and it returned $529,536 back to DDSN, exactly the same amount of "unspent" capital funds it had returned to SCDDSN the previous year.

239. Upon information and belief, this retransfer of more than half a million dollars a year was not reported to the governing board of SCDDSN.

240. During FY 2004, DDSN overpaid the Babcock Center $1,069,138 for other services.

241. By FY 2004, the rate of substantiated cases of abuse, neglect and exploitation at the Babcock Center was four times the statewide average.

242. In 2005, DDSN required the Babcock Center to "downsize" because of the extensive abuse, neglect and exploitation of its clients, but it allowed the Babcock Center to offset this reduction by increasing attendance at and funding for its workshops.

243. An audit released by SCDHHS in February 2006, reported SCDDSN's findings that the rate of substantiated cases of abuse, neglect and exploitation at the Babcock Center in 2002 was double the statewide average, but by 2004, the rate of substantiated cases at the Babcock Center was four times the statewide average.

244. Despite these findings of abuse, neglect and exploitation of clients at the Babcock Center, SCDDSN continued to transfer millions to build up WAC's there and to employ the Babcock Center as the "fiscal intermediary."

245. During FY 2005, the Babcock Center incurred a net loss of $1,989,570.

246. By FY 2006, the Babcock Center owed DDSN $2,164,578 for "settlements of prior year cost reports."

247. In FY 2006, the Babcock Center sold ten properties which had cost $2,083,068 for a gross price of $1,236,250.

248. The Babcock Center owed DDSN $716,074 for related capital contributions on these properties, but DDSN forgave this debt.

249. In FY 2006, DDSN provided the Babcock Center a $1,800,000 noncompetitive capital grant to purchase a new administration building.

250. This transfer of state and/or federal funds was not approved by the South Carolina

Budget and Control Board or the governing board of SCDDSN.

251. During FY 2006, the Babcock Center borrowed $1.5 million from BB&T for general operating purposes. The note was unsecured with an interest at a rate of 9%.

252. During FY 2006 or 2007, the United States Department of Housing and Urban Development foreclosed on two properties owned by the Babcock Center with an outstanding debt of $392,265.

253. In FY 2007, DDSN forgave $2,164,578 of debt that the Babcock Center owed to the state.

254. In FY 2007, DDSN paid the Babcock Center $2,200,000 for "purchase and upfitting" of a new administration building. (It is unclear whether this the payment of $1.8 million for an administration building in FY 2006 is a part of this $2.164 million payment or whether this is an additional transfer of funds.)

255. During this time, one SCDDSN Commissioner learned of these diversions of funds and she made repeated attempts to report these violations to the Governor's Office.

256. This Commissioner made requests for financial records showing these transfers, which had been made SCDDSN officials without the knowledge or consent of the governing board of the agency.

257. When the SCDDSN Commissioner requested these records, officials at SCDDSN informed her that she was not entitled to receive these records.

258. When this SCDDSN Commissioner made a FOIA request to obtain these records, she was informed that SCDDSN Commissioners were not entitled to make FOIA requests unless a majority of the Commissioners joined in the request.

259. This SCDDSN Commissioner and the internal auditor for SCDDSN reported these transfers of millions of dollars to purchase real estate and to forgive debts of the Babcock Center to the Office of the Governor on at least two occasions.

260. The response of Governor Mark Sanford was to call for the resignation of the SCDDSN Commissioner who reported these misappropriations.

261. The SCDDSN Commissioner and the agency's internal auditor then took this information to the South Carolina Legislative Audit Council (LAC) and the audit released in December 2008 confirmed what they had reported to the Governor's Office, i.e. barriers to competition by non-DSN Boards and tens of millions of taxpayer funds being spent to purchase real estate without an authorization by the governing board of SCDDSN.

262. Upon information and belief, around October 2008, the former director of DDSN, the former director of DHHS, Kathi Lacy, Judy Johnson and others who will be identified during discovery, began working together to eliminate or reduce waiver services under the false pretense of "budget reductions."

263. This scheme involved "mining" waiver participants who receive ADHC services from private providers across the state in order to increase attendance at WAC's operated by DSN Boards.

264. In December 2008, the South Carolina Legislative Audit Council released an audit of the MR/RD Medicaid waiver program (hereinafter referred to as the "LAC Audit"), reporting that DDSN had spent tens of millions of dollars intended to provide services to purchase real estate instead, and that by doing so had lost tens of millions of federal

matching funds.

265. This audit criticized SCDDSN for establishing barriers to competition by private providers of Medicaid waiver services and the State's preferential treatment to local DSN Boards and the Babcock Center.

266. Upon information and belief, since that time, SCDDSN has actually *increased* the proportion of services being provided by DSN boards while increasing the barriers to competition by private providers.

267. Even after this LAC audit was released, SCDDSN continued to provide financial incentives to the Babcock Center and local DSN Boards which were intended to maintain the monopoly these organizations have over private providers of MR/RD waiver services, thereby limiting the Plaintiffs' and Class Members' choice of providers.

268. In February 2009, Congress passed the American Recovery and Reinvestment Act which increased the Medicaid match rate paid to South Carolina from approximately 70% to approximately 80%, resulting in a surplus at SCDDSN of more than $30 million by June 2009, with additional tens of millions of federal Medicaid stimulus dollars being paid to SCDDSN through the present time.

269. At the urging of former DHHS director Emma Forkner, the General Assembly passed a proviso requiring SCDDSN and SCDHHS to divert these federal Medicaid stimulus funds into a rainy day account.

270. DDSN spent tens of millions of dollars intended and allocated by the General Assembly for the purpose of providing home and community based services buying

WAC's instead.

271. At the beginning of FY 2010, DDSN funded WAC's owed DDSN more than $553,000, but private ADHC providers are not paid to operate in a deficit.

272. The misuse of taxpayer funds to purchase real estate to be used as WAC's has concealed the real cost of WAC services from the public and from CMS.

273. In August, 2009, SCDHHS ordered reductions in MR/RD Medicaid waiver services which became effective in January 2010.

274. Most of the services which were reduced or eliminated were provided by private providers, not DSN Boards.

275. Because the capitated rates paid to DSN Boards were not reduced, or they were slightly lowered on January 1, 2010, the elimination or reductions of services which took effect on that date did not result in any real savings to the State.

276. In early August 2009, the directors of DDSN and DHHS, along with Governor Sanford's Chief of Staff, Scott English, met with a representative of South Carolina Voices, a grassroots advocacy organization, and these state officials insisted that the reductions in home based services were unavoidable because of budget reductions.

277. None of these officials mentioned at that meeting that DDSN was then holding, in addition to millions of dollars of unspent federal stimulus funds, an excess funds account containing $7.8 million which could have been used to avoid these reductions in services.

278. Within days of this meeting, Dr. Laurent wrote to the South Carolina Budget and Control Board asking to spend $2.6 million of these "excess" funds to purchase even

more WAC's.

279. The cost of these WAC's was enough to avoid the reductions to MR/RD Medicaid waiver services which were scheduled to take effect on January 1, 2010.

280. These transfers of public funds included $800,000 to be paid to the Babcock Center to purchase a WAC, $1 million to the Horry County DSN Board and $800,000 to the Beaufort County DSN Board for the purpose of purchasing and/or renovation of WAC's which would compete with private providers of ADHC services.

281. Upon information and belief, most of the rest of these funds were paid to the SCBCB as a *quid pro quo* for permission to purchase the WAC's, instead of being used to prevent reductions in MR/RD Medicaid waiver services.

282. The amendments that took effect on January 1, 2010 effectively increased funds paid by SCDDSN to DSN Boards and to the Babcock Center, while reducing funds paid to private providers of waiver services, because the services that were eliminated or reduced were those provided by private providers.

283. These amendments reduced the choices of providers available to Plaintiff's and Class Members, having the intended effect of forcing many of them into WAC's.

284. The opening of the "new" Babcock Center WAC in the spring of 2011 (which was funded with $1 million in "excess funds") coincides with the date of SCDDSN's termination of ADHC services of the Plaintiffs and Class Members living in Richland and Lexington Counties.

285. In preparation for opening this Babcock Center workshop, approximately six months before the scheduled date for opening, Babcock Center Director Judy Johnson, sent a

letter to the Associate Director of SCDDSN, Kathi Lacy, complaining that funds paid for ADHC services were unnecessary.

286. As part of this scheme to mine the Plaintiffs and Class Members from private ADHC centers, Defendant Chorey sent a memorandum to all DSN Service Coordination Supervisors across the State on December 21, 2010, instructing them to evaluate all waiver participants who attend ADHC centers, encouraging them to substitute "traditional Day Services options" (i.e. WAC services) for ADHC services.

287. On December 31, 2010, Defendant Lacy wrote a letter titled "Excessive Service Authorizations" confirming that her review of ADHC services was done at the behest of Defendant Johnson.

288. Defendant Johnson asked Defendant Lacy to review those waiver participants, including the Plaintiffs and Class Members, whose costs exceeded the capitated rate paid to the Babcock Center.

289. In this letter, Defendant Lacy admitted that she had reviewed "hundreds of assessments and support plans" and determined that "many, many services ...were authorized by the Service Coordinator without apparent medical necessity or justification."

290. Defendant Lacy stated in this letter that she was "personally involved in the review" so that she was able to see "firsthand" the services "being funded with precious Medicaid dollars that were extraordinarily excessive."

291. Defendant Lacy instructed DDSN service coordinators to review "every assessment and support plan for which ADHC and/or specialized medical equipment/AT is being

funded ...no later than January 31, 2011" and she directed the local DSN Boards "to report back to me any action you have taken, by consumer name."

292. On January 5, 2011, the Director of the Richland Lexington Disabilities Board, Mary Leitner, sent notices to the Plaintiffs and Class Members informing them that:

> A brief review of ADHC services conducted by DDSN indicated that there are consumers receiving the service who do not meet eligibility criteria. We have been instructed to reassess service eligibility and terminate services if required.

293. Ms. Leitner informed the Plaintiffs and Class Members in this letter that her service coordinators (who have no medical training) would be "reassessing the need for ADHC."

294. Upon information and belief, these assessments were done by DDSN service coordinators across the State without consulting with the physicians who had ordered ADHC services for waiver participants.

295. Upon information and belief, Defendant Lacy was not satisfied with the assessments performed by the Richland and Lexington County DSN Board service coordinators and she then personally reviewed the eligibility of the Plaintiffs and Class Members and determined that Medicaid funds were being wasted providing them with ADHC services.

296. In April 2011, Helping Hands and Hope Bridge received notices informing them that SCDDSN had determined that most of the SCDDSN waiver participants in Richland and Lexington Counties no longer met the eligibility criteria to receive ADHC services.

297. Upon information and belief, such assessments of the need for ADHC services are being undertaken throughout the State, giving no deference to the orders of treating

physicians.

298. On or about April 21, 2011, notices were sent to Plaintiffs and Class Members who live in Richland and Lexington Counties informing them that their ADHC services were being terminated and the reason given was "Change in need; no longer justifies the original request."

299. Changes to the eligibility requirements for ADHC services were made by Defendant Lacy and her staff which contradict the requirements which had been approved by CMS and these changes were made without notice to or the consent of the governing board of SCDDSN.

300. Upon information and belief, Defendant Lacy and her agents are currently reviewing the eligibility of severely disabled MR/RD waiver participants who attend privately owned ADHC centers around the state in an effort to increase attendance at the DSN Board WAC's SCDDSN has purchased in recent years.

301. Hundreds of the most vulnerable citizens of the State are at risk of being forced into sheltered workshops, where they will be paid subminimum wages and their medical needs will not be met.

302. In some WAC's waiver participants are assigned to a table and are restricted from moving during much of the day, severely limiting their liberty and right to interact with persons they choose.

303. Upon information and belief these changes were made without conducting a study of medical necessity by a qualified reviewer and without conducting an economic analysis of the cost of alternative services.

Comparative Costs of ADHC vs. WAC Services

304. When the costs of the DSN Board WAC's which were purchased with tax dollars are considered, the cost of ADHC services is actually less than the cost of WAC services which DDSN and the individual defendants are attempting to force medically fragile waiver participants to receive.

305. SCDDSN currently bills Medicaid $45.50 per day for WAC services, but it has offered to pay private providers of WAC services only $32.00 per day.

306. The staffing ratios at these WAC programs will be less than those provided at the ADHC centers.

307. SCDDSN pays the Babcock Center and local DSN Boards in advance for WAC services, but it pays Helping Hands, Hope Bridge and other private ADHC providers only after the services are provided.

308. SCDDSN has informed Hope Bridge that they must submit their bills for reimbursement of WAC services to their competitor, the Babcock Center.

Financial Exploitation of WAC Participants

309. The LAC audit disclosed that tens of millions of dollars allocated by the General Assembly to SCDDSN to provide residential services for waiver participants on the waiting list were used instead to purchase WAC's.

310. By legislative proviso, the profits of the labor of disabled persons attending WAC's are paid to SCDDSN, to be spent at the discretion of SCDDSN without oversight by its governing board, the SCBCB or the General Assembly.

311. At these WAC's, sometimes called "sheltered workshops," persons who have

disabilities are paid subminimum wages for their work.

312. In January 2011, the National Disabilities Rights Network issued a report titled "Segregated and Exploited" which reported that sheltered workshops, such as DDSN's WAC's are "warehousing" people with disabilities, limiting their opportunities and putting them in danger of abuse and neglect, while providing financial gain for employers, some of whom earn six-figure salaries." See http://www.disabilitylawcenter.org/Segregated-and-Exploited%20v18.pdf

313. The Director of the Babcock Center, Judy Johnson, and the Director of SCDDSN, Beverly Buscemi, the Associate Directors of SCDDSN, Kathi Lacy and Thomas P. Waring, the Director of SCDHHS, the Director of the SCBCB and Governor Haley all earn six figure salaries and they benefit from the exploitation of persons attending WAC's.

314. Upon information and belief, the salary of Defendant Buscemi was increased by more than 50% during the past year, while services provided to MR/RD Medicaid waiver participants was slashed due to claims of "budget reductions."

315. The report issued by the National Disabilities Rights Network found that: "Sheltered workshops are often celebrated for providing an altruistic service to their communities...In reality they provide workers with disabilities with dead-end jobs, meager wages and the glimpse of a future containing little else."

316. When the "Segregated and Exploited" report was released, Defendants were finalizing their scheme to divert waiver participants from private ADHC centers into WAC's operated by the Babcock Center and local DSN Boards, where DDSN and other Defendants will profit from their labors.

317. Upon information and belief, SCDDSN has moved many people across the state out of competitive employment and enclaves in the community into WAC's in order to take financial advantage of them.

318. Upon information and belief, the real reason for SCDDSN terminating the ADHC services of waiver participants was to increase attendance at WAC's and to maintain the monopoly of the Babcock Center and local Disabilities and Special Needs Boards.

319. Defendants Johnson, Buscemi, Lacy, Waring and Chorey, along with others who will be identified during discovery worked together to time the termination of Plaintiffs' ADHC services to coincide with the opening of the Babcock Center's new WAC in Columbia, South Carolina.

320. In order to fund these WAC's across the state, DDSN implemented tremendous reductions in home and community based waiver services that has affected the ability of the Plaintiffs and Class Members to remain out of institutions or impeded them from moving from a more restrictive residential placement to a less restrictive placement.

321. If the funds used to purchase these three WAC's had instead been used to provide home and community-based services, the $2.6 million spent purchasing three WAC's in FY 2010 could have produced $13 million in waiver services (with the federal Medicaid match).

322. Private providers of MR/RD waiver services (those not "grandfathered" as DSN Boards) must pay the cost to purchase or rent facilities out of the daily rate paid by Medicaid, but DDSN pays for WAC's with taxpayer dollars, creating unfair

competition and reducing choice for waiver participants like the Plaintiffs and Class Members.

323. Persons who live in group homes have been informed that their ADHC services are being terminated because they "duplicate" Residential Habilitation Services, but WAC services are not considered by SCDDSN to be "duplicative" of Residential Habilitation Services.

Violations of the South Carolina Medical Practice Act

324. The South Carolina Department of Labor, Licensing and Regulation has determined that the act of determining medical necessity or appropriateness of proposed medical care, so as to affect the diagnosis or treatment of a patient located in South Carolina, is the practice of medicine, as defined by Section 40-47-40 of the 1976 Code of Laws of South Carolina, as amended, and those determinations must be made by a physician licensed to practice medicine in this State.

325. Making determinations of medical necessity or appropriateness of medical care requires independent medical judgment that is reserved to physicians, especially determinations to deny, reduce, or terminate health care services or to deny payment for a health care service because that service is not medically necessary.

326. The individual Defendants have engaged in a scheme to affect the diagnosis or treatment of a patient in South Carolina which requires a South Carolina medical license.

327. Service Coordinators are not physicians and they are not qualified to determine medical necessity.

328. By determining medical necessity and appropriateness for ADHC services, DSN Service Coordinators and Defendants Lacy and Johnson have engaged in the

unauthorized practice of medicine.

329. These Defendants have injured Plaintiffs and Class Members thereby by forcing them to engage legal counsel to protect their rights to receive medically appropriate ADHC services.

330. Plaintiffs have been informed that their ADHC services will be terminated based on assessments conducted by DSN Service Coordinators and or DDSN personnel, who are not physicians.

Fear of Retaliation

331. The official who exposed the financial mismanagement of funds and inappropriate purchase of real estate by the Babcock Center has been subjected to reprisals, as have other employees, former SCDDSN Commissioners, and contractors who have attempted to expose problems and barriers to competition at SCDDSN.

332. Families,waiver participants and contractors have been subjected to reprisals and retaliation by Kathi Lacy and others associated with SCDDSN for exposing problems at SCDDSN, local DSN Boards and the Babcock Center.

333. Upon information and belief, one SCDDSN Commissioner who exposed these problems was asked to resign and was not reappointed when her term expired and another Commissioner was removed by Governor Sanford for objecting to changes which reduced choice and continued the barriers to non-DSN Boards providing services while diverting millions of dollars to the Babcock Center to purchase real estate.

334. An independent service coordinator who exposed the purchase of a Superfund site for

use as a WAC in Spartanburg County with funds provided by SCDDSN experienced retaliation and she disappeared from the state in late 2010 after she was named as a witness in a federal *Olmstead* /ADA lawsuit captioned *Peter B. v. Sanford*.

335. Upon information and belief, this witness was silenced by threats from SCDDSN officials because she knew about SCDDSN moving individuals from competitive employment and community based work enclaves to the WAC on this Superfund site and advocated for the rights of SCDDSN Medicaid waiver participants.

336. The certification of an independent behavior support provider was terminated by Defendants Buscemi and Lacy after she provided affidavits in support of MR/RD Medicaid waiver participants and was listed as a witness in the *Peter B. v. Sanford* litigation in federal court.

337. SCDDSN officials have retaliated against MR/RD waiver participants who have been sent far from their homes or to a SCDDSN regional center when their guardians have attempted to exercise their rights and there has been a pattern of SCDDSN making reports to state officials that family members have abused, neglected or exploited them in retaliation for those family members exercising their rights.

CAUSES OF ACTION

COUNT ONE
VIOLATION OF THE AMERICANS WITH DISABILITIES ACT

1. Plaintiffs and Class Members adopt and restate the allegations set forth above in this complaint.

2. It is undisputed that Plaintiffs are qualified individuals with disabilities who have

physical and/or mental impairments that substantially limit one or more of their major life activities, including, but not limited to one of more of the following: thinking, walking, communicating, learning, working, caring for themselves and concentrating. See 42 U.S.C. § 12102.

3. The treating professionals of the State have determined that community-based treatment is appropriate for the Plaintiffs and Class Members; they do not oppose community placement and their needs can be reasonably accommodated without fundamentally altering the nature of how the State delivers services.

4. Public entities, like the SCBCB, the South Carolina General Assembly, SCDHHS, SCDDSN, the Babcock Center and local DSN Boards are required by federal law to make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, except where the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. 28 CFR § 35.130(b)(7).

5. Officials of the South Carolina Budget and Control Board failed to insure that the funds paid to SCDDSN were spent appropriately for services Plaintiffs and Class Members need, despite repeated warnings from the South Carolina Legislative Audit Council, federal and state audits showing that SCDDSN was spending those funds to purchase real estate.

6. The South Carolina General Assembly has failed to consider the State's obligations under the ADA in allocating funds necessary to provide necessary community based services to Plaintiffs and Class Members to allow them to receive services in the most

integrated setting appropriate to their treatment needs.

7. Defendants have failed to consider their obligations to the Plaintiffs and Class Members under the ADA by expending tens of millions of dollars unnecessarily to purchase and renovate real property used as WAC's which properties are being utilized to financially exploit persons who have disabilities.

8. Defendants have acted to terminate the ADHC services of the Plaintiffs and Class Members and to reduce other services needed by Medicaid waiver participants which are necessary to allow them to live in the least restrictive setting.

9. These actions were taken without conducting a cost analysis to determine the cost of alternative services, including, but not limited to the cost of WAC services and the real estate funded by SCDDSN.

10. In doing so, Defendants have been indifferent to the medical, emotional and other treatment needs of the Plaintiffs and Class Members and to the full costs of operating the WAC's owned by local DSN Boards.

11. The treating physicians of the Plaintiffs and Class Members have determined that ADHC services are medically necessary and the Defendants have failed to give deference to the treatment orders of their treating physicians in violation of the mandate of the United States Supreme Court in *Olmstead v. L.C.*527 U.S. 581 (1999).

12. Under the "integration mandate" of Title II of the ADA, Defendants must administer long-term care services in a manner that provides services to individuals who have disabilities in the most integrated setting appropriate to their needs.

13. Services provided in WAC's are not appropriate to the needs of the Plaintiffs and

Class Members.

14. The actions taken by Defendants discriminate against persons whose physicians have determined that they require ADHC, by denying services that are appropriate to their needs.

15. The State's unjustified attempts to force these persons into WAC's place them at risk of institutionalization, including hospitals, nursing homes and ICF/MR's and it constitutes a form of discrimination based on disability which is prohibited by Title II, 42 U.S.C. § 12101(a)(2), (5).

16. The arbitrary determinations made by DSN Service Coordinators, who are acting on directives from Defendant Kathi Lacy and other individual Defendants for economic gain, will force the Plaintiffs and Class Members into inappropriate placements where their health and safety will be endangered at greater costs to taxpayers of the State.

17. The services Plaintiffs and Class Members request are not unreasonable, given the demands on the State's health care budget and the resources available to pay for these services and the ADHC services Plaintiffs request cost less than placement in a hospital or an SCDDSN Regional Center.

18. The Plaintiffs' needs can be reasonably accommodated, as has been demonstrated by their continuous care in the community while receiving ADHC services for many years.

19. Providing the ADHC services Plaintiffs request would not place an unreasonable burden on the State nor would it force the state to fundamentally alter the nature of its programs.

20. ADHC services ordered by Plaintiffs's and Class Members' physicians can be

provided without undue burden to the state, taking into consideration its obligation to provide health care and services with an "even hand."

21. Defendants have further violated the ADA by denying Kobe's requests for an ACD and his choice to move to a less restrictive setting and by reducing Mark's respite services, which are all needed for him to remain out of an institutional setting.

22. Defendants have failed to make reasonable modifications to the programs operated by SCDDSN which are necessary for Plaintiffs to receive services in the least restrictive setting.

23. The failure to offer Plaintiffs and Class Members services, including, but not limited to ADHC services, to allow Plaintiffs to live in integrated home and community based settings constitutes unlawful discrimination in violation of Title II of the ADA and its implementing regulations at 28 C.F.R. § 35.130(d).

24. Defendants have failed to exercise their discretion in a non-discriminatory manner by denying Plaintiffs necessary funds used to provide the ADHC services they require to live the least restrictive setting.

25. The willful and intentional acts of the individual Defendants have placed the Plaintiffs and Class members at risk and caused them to experience extreme emotional distress and fear of retaliation for filing this lawsuit in violation of the anti-retaliation provisions of the ADA.

26. Plaintiffs request a finding that Defendants have violated the ADA and its implementing regulations and an order requiring that Defendants pay attorney fees, expenses and costs and damages in such amount as the Court shall determine to be just and fair.

COUNT TWO
VIOLATION OF SECTION 504 OF THE REHABILITATION ACT

27. Plaintiffs adopt and restate the allegations set forth above in this complaint.

28. Section 504 of the Rehabilitation Act of 1973 provides, "no otherwise qualified individual with a disability in the United States...shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. 29 U.S.C. § 794(a),

29. "Program or activity' includes a department, agency, special purpose district, or other instrumentality of a State or local Government. 29 U.S.C. § 794(b)(1)(A).

30. The Medicaid Waiver programs administered by SCDDSN are "programs or activities" provided by the State of South Carolina.

31. "Recipient" of federal financial assistance also includes any public or private agency or other entity to which Federal financial assistance is extended directly or through another recipient. 28 C.F.R. § 41.3(d).

32. SCDHHS, SCDDSN, local DSN Boards and the Babcock Center are all recipients of federal financial assistance.

33. Regulations implementing Section 504 require a recipient of federal financial assistance to administer its services, programs, and activities in the "most integrated setting appropriate" to the needs of qualified individuals with disabilities. 28 C.F.R. § 41.51(d).

34. Federal Medicaid funds account for a majority (nearly 80% when this lawsuit was filed) of the cost of the home and community based waiver programs administered by

SCDDSN.

35. Defendants and their contracting agencies and organizations are recipients of Federal financial assistance under Section 504 and its implementing regulations.

36. Plaintiffs are "qualified persons with disabilities" within the meaning of Section 504 because they have physical and/or mental impairments that substantially limit one or more major life activities, and they meet the essential eligibility requirements for the home and community based waiver programs administered by SCDDSN. See 29 U.S.C. § 705(9).

37. The treating physicians of the Plaintiffs and Class Members have determined that ADHC services are provided in the "most integrated setting appropriate" to their medical needs as qualified individuals with disabilities. 28 C.F.R. § 41.51(d).

38. The South Carolina Budget and Control Board failed to insure that the funds allocated to SCDDSN were spent as appropriated by the General Assembly to provide services, despite warnings from the South Carolina Legislative Audit Council that SCDDSN was spending those funds improperly for the purchase of real estate.

39. Defendants have threatened to terminate funds necessary for Plaintiffs and Class Members to receive services in the most integrated setting appropriate to meet their needs in order to financially exploit them.

40. Defendants have failed to make reasonable modifications to home and community based waiver programs to allow Plaintiffs and Class Members to receive ADHC services and other home and community based waiver services so that they can successfully live in the least restrictive setting appropriate to their needs.

41. Failure to provide services in the least restrictive setting appropriate to the needs of

Plaintiffs and Class Members and forcing them to attend WAC's, where they will be financially exploited, constitutes unlawful segregation in violation of Section 504 of the Rehabilitation Act and its implementing regulations at 28 C.F.R. 42.51(d).

42. The individual Defendants, Buscemi, Lacy, Waring, Huntress, Chorey and Johnson have acted willfully together and with others in intentional disregard of the federal rights of the Plaintiffs and Class Members in willful and intentional violation of Section 504.

43. Defendants have also utilized criteria and methods of administration that subject Plaintiffs to discrimination on the basis of disability, including risk of unnecessary institutionalization, by (1) failing to assess properly the services and supports that would enable Plaintiffs to live in the least restrictive setting, (2) failing to ensure that Plaintiffs have access to Medicaid-covered services that will meet their needs in the community, and (3) compelling health care providers to reduce or eliminate recommended ADHC services, thereby violating Section 504 and its implementing regulations.

44. Because of the willful and intentional acts of the individual Defendants, the Plaintiffs and Class members have experienced extreme emotional distress due to fear of loss of services which their physicians have determined to be medically necessary and fear of harm if they are forced to attend a WAC.

45. Defendants have experienced fear of retaliation for filing this lawsuit.

46. Defendants have violated Section 504 by failing to provide Kobe with an ACD and services in an apartment setting and they have violated Mark's right to receive respite services at the pre-January 1, 2010 level and other cost effective home and community

based waiver services that allow waiver participants to live in the least restrictive setting.

47. Plaintiffs and Class Members request a finding that Defendants have violated Section 504 and its implementing regulations and that Defendants pay attorney fees, expenses and costs and such other damages to the Plaintiffs and Class Members, including damages for emotional distress, in such amount as the Court shall determine to be just and fair.

COUNT THREE
VIOLATION OF 42 U.S.C. § 1983

48. Plaintiffs adopt and restate the allegations set forth in the paragraphs above.

49. At all relevant times herein, Plaintiffs and Class Members have had a right under the Medicaid Act to receive ADHC.

50. Defendants Haley, Kitzman, McConnell, Harrell, Keck, Buscemi, Lacy, Waring, Huntress, Johnson and Leitner are persons who, acting under color of law, have violated the civil rights of the Plaintiffs and Class Members by violating provisions of the Medicaid Act.

51. Defendants Buscemi, Lacy, Waring, Huntress, Chorey and Johnson and others who will be identified during discovery schemed to divert funds from ADHC services to WAC's and to deny the rights of Plaintiffs and Class Members to these and other Medicaid services needed to live in the least restrictive setting.

52. Acting under the color of law, Defendants worked a denial of the rights and privileges of Plaintiffs and Class Members which are secured by the United States Constitution or by Federal law and which are guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States, to wit, they have denied their right to life, liberty and the pursuit of happiness by denying ADHC services ordered by their physicians in order to

effectively force them into unsafe and inappropriate WAC's.

53. As a result of the concerted unlawful and malicious conduct of Defendants Buscemi, Lacy, Waring, Chorey, Huntress and Johnson, Plaintiffs and Class Members have been deprived of their rights to equal protection of all the laws and to due process of law, their right to property interests in Medicaid benefits, and the due course of justice has been impeded, in violation of the Fourth, Fifth, and Fourteenth Amendments of the Constitution of the United States and 42 U.S.C. § 1983.

54. Individual Defendants Buscemi, Lacy, Waring, Chorey, Huntress and Johnson have neglected the needs of Plaintiffs and Class Members and they have done so with evil motives and intents and their actions have involved reckless and callous indifference to the rights of the Plaintiffs and other Class Members.

55. All of the Defendants have acted with reckless or callous indifference to the federally protected rights of Plaintiffs and Class Members, thereby placing the health and even the very lives of Plaintiffs and Class Members at risk.

56. Defendants have recklessly and callously refused to provide Kobe with an ACD and have refused to provide him the supports he would need to live in a less restrictive setting.

57. Defendants have recklessly and callously reduced the respite services Mark needs to remain in the home of his sister and they have threatened to terminate ADHC services of waiver participants across the State.

58. Plaintiffs and Class Members and their families have been subjected to fear of harm, shock, and emotional scarring, as well as fear of reprisal and of bodily harm, which are all compensable as emotional distress, and other damages.

59. Plaintiffs and Class Members demand judgment for the violation of their civil rights against all the Defendants, jointly and severally, for actual, general, special, compensatory damages in an amount to be determined by a jury and further demands judgment against all Defendants, jointly and severally, for punitive damages in an amount to be determined by the jury, plus the costs of this action, including attorney's fees, and such other relief deemed to be just, fair, and appropriate.

60. Punitive damages are recoverable in a 42 U.S.C. § 1983 suit where defendant's conduct is motivated by an evil motive or intent, or where it involves reckless or callous indifference to plaintiff's federally protected rights.

COUNT FOUR
VIOLATION OF 42 U.S.C. §§ 1983 and 1988 (violation of civil rights)

61. The Plaintiffs and Class Members repeat and realledge and incorporate by reference the allegations set forth above with the same force and effect as if herein set forth.

62. It is not alleged that Defendant Cynthia Mann acted under color of state law and she is not a party to this Count.

63. At all relevant times herein, Plaintiffs and Class Members had a right under the Medicaid Act, the ADA and Section 504 to receive ADHC services and other home and community based services which are necessary for them to live in the least restrictive setting.

64. The Defendants are persons who, acting under color of law, have violated the civil rights of the Plaintiffs and Class Members by denying their rights to receive these services and attempting to force them into WAC’s, where their health and safety will be jeopardized.

65. Defendants Haley, Kitzman, McConnell, Harrell, Keck, Buscemi, Huntress, Lacy, Waring, Chorey and Johnson, and other persons who may be identified during discovery, have acted

in their official capacities, or failed to act where they had a duty to do so, and have thereby caused Plaintiffs and Class Members to be denied services, including, but not limited to ADHC services, which they are entitled to receive to enable them to live in the least restrictive setting.

66. Defendants have failed to assure that funding necessary to protect the health and welfare of Plaintiffs and Class Members, as is required by the Medicaid Act and its regulations, has been spent as allocated and intended to provide ADHC and other home and community based waiver services.

67. All of the Defendants have failed to act with promptness upon findings of the South Carolina Legislative Audit Counsel showing that funds allocated for community based services have been diverted instead to purchase unnecessary real estate, thus allowing DDSN to continue the unbridled spending of taxpayer dollars to purchase more real estate instead of using available resources in compliance with the ADA, Section 504 and the Medicaid Act to prevent hospitalization and institutionalization and to allow waiver participants to function with the most independence possible.

68. Defendants have violated the rights of Plaintiffs and Class Members to life and liberty in violation of the due process requirements of the United States Constitution by attempting to force them into WAC's for the financial benefit of state agencies and the Babcock Center.

69. Defendants have violated the free choice of providers granted to Plaintiffs and Class Members by the Medicaid Act, instead, attempting to force them to use inappropriate services provided by the Babcock Center, SCDDSN and its local Boards.

70. Defendants Buscemi, Lacy, Waring, Chorey and Johnson, along with other persons who may be identified during discovery, have schemed to divert funds from ADHC services to WAC's so as to financially benefit the Babcock Center and local DSN Boards and to exploit the Plaintiffs and Class Members in conscious disregard for their rights and privileges which are secured by the United States Constitution or by Federal law and which are guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States.

71. Defendants have failed to inform Plaintiffs and Class Members of other feasible Medicaid services which they are entitled to receive with reasonable promptness.

72. Defendants have failed to establish reasonable standards for the operation of the Medicaid waiver programs administered by SCDDSN and have failed to require SCDDSN to promulgate regulations as required by the South Carolina Administrative Procedures Act for the provision of services to Plaintiffs and Class Members.

73. As a result of these practices, policies for waiver programs and services are set by Defendants Buscemi, Lacy and Johnson without meaningful public review or meaningful public input.

74. Defendants have violated the free choice of providers of Plaintiffs and Class Members by failing to inform them of feasible alternatives and by obstructing their choices of providers while attempting to maintain the monopoly of services provided by SCDDSN, its local DSN Boards and the Babcock Center.

75. Defendants have violated the equal access provisions of the Medicaid Act by failing to make services available to waiver participants as they are available to the general public.

76. Specifically, and in addition to the violations described above, Defendants Keck, Buscemi and Johnson have violated Kobe's civil rights which are enforceable under 42 U.S.C. § 1983 because they have failed to provide him with an augmentative communications device (ACD) and residential services in a less restrictive and more integrated setting with reasonable promptness.

77. Kobe is unable to communicate verbally because of his profound speech impediment due to cerebral palsy, but he would be able to communicate using augmentative communications device (ACD) which would allow him to speak using eye control, head tracking and multiple types of switches which can be attached to his wheelchair headrest.

78. As the federal district court recognized in ordering the state to pay for an ACD for a Medicaid participant with disabilities similar to Kobe's, in *Fred C. v.Texas Health and Human Services Com'n:* "The inability to speak can be the single most devastating aspect of any handicap." 988 F.Supp. 1032 (W.D.Tex. 1997).

79. The Babcock Center, which receives Kobe's capitated funding payment from SCDDSN and has a financial incentive to deny funding for the device, has repeatedly promised Kobe to provide him with an ACD, but it has not provided an appropriate device with reasonable promptness, as is required by 42 U.S.C. § 1396a(a)(8), the ADA and Section 504.

80. In *Meyers v. Reagan*, the Eighth Circuit, found the plaintiff to be entitled to Medicaid funding for an ACD because the primary goal of Medicaid is to provide services to help the recipient "attain or retain capability for independence or self-care." *Id*. at 243 (citing 42 U.S.C. § 1396).

81. Medicaid regulations specifically state that the benefits provided must include services

recommended "for maximum reduction of physical or mental disability and restoration of a recipient to his best possible function level." 42 C.F.R. § 440.130(d) (1996).

82. In order for Kobe to be restored to his best possible function level, it is necessary for him to be able to communicate effectively with others. See *Fred C. v. Texas Health and Human Services Com'n*, 988 F.Supp. 1032 (W.D.Tex. 1997).

83. This equipment is needed in order for Kobe to communicate with other persons in order to be more fully integrated into the community and to communicate his needs clearly with his health care providers.

84. These ACD's are funded by Medicaid in at least 47 states.

85. 42 U.S.C. § 1396a(a)(8) requires the State to provide Medicaid services and equipment with reasonable promptness and Medicaid regulations require the State to establish reasonable standards, as required by 42 U.S.C. § 1396a(a)(17), and to communicate those standards promptly to Medicaid participants.

86. Medicaid regulations require SCDDSN and SCDHHS to establish eligibility for Medicaid funded devices within 90 days of the request and to provide a notice of a right to a fair hearing when such requests are denied or the device is not provided with reasonable promptness.

87. There is no other method for Kobe to communicate effectively other than using an ACD and providing an ACD would not fundamentally alter the State's programs.

88. On January 1, 2010, Defendants eliminated speech and language therapy as a MR/RD Medicaid waiver service based on false claims of a lack of funding, making it nearly impossible for Kobe and other persons who need ACD's to receive the speech assessment

needed to obtain an order for the devices.

89. Kobe will need speech therapy to learn to use the device and to communicate his needs using the device.

90. Mark has been denied needed respite services based on false claims of inadequate funding which were sent via U.S. Mail to CMS.

91. Upon information and belief, SCDDSN has continued to bill Medicaid the same amount, or more, for respite services, despite having shifted the costs of liability insurance, worker's comp and unemployment to the families of waiver participants.

92. As a result of Defendants' concerted unlawful and malicious conduct, Plaintiffs and Class Members have been deprived of their rights to equal protection of all the laws and to due process of law, to their right to property interests in Medicaid benefits, and the due course of justice has been impeded, in violation of the Fourth, Fifth, and Fourteenth Amendments of the Constitution of the United States and 42 U.S.C. § 1983.

93. Plaintiffs and Class Members have been subjected to fear of harm, shock, and emotional scarring, which are all compensable as emotional distress, and other damages.

94. Defendants Buscemi, Lacy, Waring, Chorey and Johnson have acted with an evil motive or intent to deny services Plaintiffs and Class Members are entitled to receive in order to financially benefit themselves and their organizations.

95. The Defendants have acted with reckless or callous indifference to the federally protected rights of Plaintiffs and Class Members, causing funding allocated to provide Medicaid services to "lapse" or to be paid to a rainy day account, thus losing hundreds of millions of matching federal dollars.

96. Wherefore, Plaintiffs and Class Members demand judgment for the violation of their civil rights against all the Defendants, jointly and severally, for actual, general, special, compensatory damages in the amount determined by a jury and further demands judgment against all defendants, jointly and severally, for punitive damages in an amount to be determined by the jury, plus the costs of this action, including attorney's fees, and such other relief deemed to be just, fair, and appropriate.

97. Punitive damages are recoverable in a § 1983 suit where, as in this case, the defendants' conduct is motivated by an evil motive or intent, or where, as here, it involves reckless or callous indifference to plaintiffs' federally protected rights and Plaintiffs and Class Members request punitive damages as may be awarded by a jury.

COUNT FIVE
VIOLATION OF 42 U.S.C. § 1985(3) (conspiracy)

98. The Plaintiffs and Class Members repeat and reallege and incorporate by reference the allegations set forth above with the same force and effect as if herein set forth.

99. It is not alleged that Defendants Cynthia Mann, Nikki Haley, Eleanor Kitzman, Glenn F. McConnell, Robert W. Harrell, Jr., Anthony Keck or Mary Leitner participated in their individual capacities in the conspiracies alleged herein.

100. The individual Defendants Buscemi, Lacy, Waring, Chorey and Johnson, together with other unnamed persons who may be identified during discovery, have acted in their individual and official capacities, under color of law to participate in a conspiracy for the purpose of depriving the Plaintiffs and Class Members, either directly or indirectly, the equal protection of the laws or of equal privileges and immunities under the laws.

101. These Defendants committed overt acts in furtherance of the conspiracy, thereby injuring

the Plaintiffs and depriving them of services which constitute a property right, in order to deprive them of constitutionally protected rights and privileges.

102. The conspiratorial purpose was financial and Defendants have acted in concert to deny the civil rights of the Plaintiffs and other Class Members by attempting to prevent them from receiving ADHC services and other waiver services they are entitled to receive in furtherance of the monopoly maintained by the Babcock Center, SCDDSN and its local DSN Boards.

103. The first steps in the conspiracy were taken when DDSN spent millions of dollars which had been allocated by the General Assembly to provide Medicaid waiver services to persons who have disabilities to purchase real estate used as WAC's instead.

104. Instead of requiring the Defendants to use funds paid by the state and federal governments to provide appropriate services, Defendants allowed SCDDSN to use allocated funds to continue to purchase real estate that is unnecessary, and indeed harmful to Participants and Class Members.

105. The individual Defendants have been working in concert since 2005 to use funds allocated for services in ways not intended by the legislature, using those funds to purchase unnecessary real estate in furtherance of the illegal monopoly of DSN Boards (and entities like the Babcock Center which are treated by DDSN as a local Board).

106. The individual Defendants have acted in concert to divert funds to WAC's operated by local DSN Boards and the Babcock Center and to deny ACHC benefits to which Plaintiffs and Class Members are entitled to receive as a result of their disabilities.

107. Actions taken by the Defendants have proximately caused injury to Plaintiffs by denying

services which they need to live in the least restrictive setting in the community.

108. Instead, Defendants have redirected state and federal funds to be used for improper purposes without regard for the negative consequences to the intended beneficiaries.

109. Defendants, acting under color of state law, have acted in concert to deprive Plaintiffs of benefits which they are entitled to receive under the reasonable promptness (42 U.S.C. §1396(a)(8)), free choice (42 U.S.C. §1902(a)(23)); comparability (42 U.S.C. §1902(a)(10)); reasonable standards (42 U.S.C. § 1396a(a)(17)) and equal access (42 U.S.C. §1396a(a)(30)) provisions of the Social Security Act.

110. Plaintiffs and Class Members request damages to be determined by a jury, an injunction and payment of legal fees, costs and expenses.

COUNT SIX
VIOLATION OF SUPREMACY CLAUSE

111. The Plaintiffs and Class Members repeat and reallege and incorporate by reference the allegations set forth above with the same force and effect as if herein set forth.

112. States are not required to participate in Medicaid waiver programs, but once they accept Medicaid funds, states are required to comply with all federal laws, rules and regulations.

113. Defendants have violated the following provisions of the Medicaid Act, in violation of the Supremacy Clause of the United States Constitution: reasonable promptness (42 U.S.C. §1396(a)(8)), free choice (42 U.S.C. § 1396(a)(23)); comparability (42 U.S.C. § 1396(a)(10)); reasonable standards (42 U.S.C. § 1396a(a)(17)) and equal access (42 U.S.C. §1396a(a)(30)) provisions of the Social Security Act.

114. Plaintiffs and Class Members pray for an order requiring Defendants to immediately comply with the Medicaid Act and to pay for attorney fees, costs and expenses of this

action and to pay the Plaintiffs and Class Members such amounts as the Court shall determine to be just.

COUNT SEVEN
VIOLATION OF RICO

115. Plaintiffs realledge and incorporated by reference the paragraphs contained above.

116. Defendants Cynthia Mann, Nikki Haley, Eleanor Kitzman, Glenn F. McConnell, Robert W. Harrell, Jr., Anthony Keck and Mary Leitner are not parties under the allegations herein for violation of RICO.

117. Defendants Buscemi, Lacy, Waring, Chorey and Johnson, together with other persons who will be identified during discovery, have engaged in enterprises to operate WAC's in order to financially exploit Plaintiffs Members by paying them subminimum wages so as to profit their agencies or themselves.

118. Defendants Buscemi, Lacy, Waring, Chorey and Johnson, together with persons who will be identified during discovery, have diverted Medicaid and state taxpayer funds to these "industrial centers" or WAC's which constitute an enterprise for purposes of RICO.

119. In furtherance of this scheme, Defendants have engaged in wire fraud through the use of telephones and email and have used the United States Mail.

120. SCDDSN has received income from WAC's and the Babcock Center and other named defendants have received income from these enterprises, as well as funds from SCDDSN to purchase real estate in furtherance of this scheme.

121. Upon information and belief, Defendant Lacy and others who will be identified during discovery have retaliated against persons who have exposed the misappropriation of funds by SCDDSN and by its officials, including retaliation against persons who were listed as

witnesses in federal trials and she has participated in schemes to remove SCDDSN Commissioners who have inquired into this enterprise.

122. Upon information and belief, Defendants Buscemi, Lacy, Waring, Chorey and Johnson, acting together with other persons who will be identified during discovery, have obstructed investigations of SCDDSN, local DSN Boards and the Babcock Center and have provided false and/or misleading information to state and federal investigators.

123. In violation of 18 U.S.C. § 1503, Defendants Johnson and Lacy have impeded the investigations of deaths and serious injuries occurring at WAC's or as a result of the failure to supervise persons at WAC's.

124. In violation of 18 U.S.C. § 1512, Defendants Johnson and Lacy, together with other persons who will be identified during discovery, have knowingly used intimidation, threatened or corruptly persuaded other persons, or attempted to do so; or have engaged in misleading conduct toward other persons in an attempt to influence, delay, or prevent the testimony of those persons in an official proceeding or to cause the persons to withhold testimony, or withhold a record, document, or other object, from an official proceeding or to alter, destroy, mutilate, or conceal an object with the intent to impair the object's integrity or availability for use in an official proceeding.

125. Upon information and belief, in violation of U.S.C. § 1512, Defendants Johnson and Lacy have tampered with witnesses.

126. Upon information and belief, in violation of U.S.C. § 1513, Defendants Buscemi, Johnson, Lacy, Waring and Chorey have used the United States Mail in furtherance of these schemes.

127. These Defendants have benefitted financially through increases in their salaries at the same time that waiver services provided to severely disabled persons were being reduced due to "budget reductions" and contractual arrangements.

128. Defendants Buscemi, Lacy, Huntress, Waring and Johnson have invested ill gotten funds in real estate used for the purpose of operating WAC's and have used funds which should have been spent providing waiver services to increase salaries of SCDDSN officials.

129. Property rights (i.e. Medicaid benefits) of the Plaintiffs have been denied by Defendants by attempting to force them to attend WAC's where they are not safe and their medical needs would not be met.

130. Upon information and belief, Defendants Buscemi, Lacy, Waring, Chorey and Johnson, together with other persons who will be identified during discovery, appear to have engaged in money laundering and interference with commerce by establishing and maintaining a monopoly of services provided by the Babcock Center, SCDDSN and local DSN Boards while attempting to drive Helping Hands, Hope Bridge and other private providers of ADHC services out of business.

131. Medicaid is an insurance program and these Defendants have filed false claims for reimbursement for Medicaid services in excess of the cost of those services.

132. These individual Defendants have transferred or obtained taxpayer funds by false pretenses.

133. These Defendants have fraudulently converted the money they were in lawful possession of with fraudulent intent.

134. Defendants have knowingly or willfully made false or fraudulent statements or

representations in or with reference to applications for insurance (Medicaid).

135. These Defendants have knowingly and willingly presented or caused to be presented statements to an insurer, a reinsurer, a producer, a broker or any agent thereof, knowing that the statement conceals or omits facts, or contains false or misleading information concerning a fact material to an application for Medicaid reimbursement.

136. These Defendants have presented or caused to be presented statements as a part of, or in support of, a claim for payment or other benefits (Medicaid), knowing that the statement conceals or omits facts, or contains false or misleading information concerning facts material to that claim.

137. These Defendants have assisted, aided, abetted, solicited and conspired with other persons to present or cause to be presented claims to an insurer, a reinsurer, a producer, a broker or any agent thereof, knowing that the statements concealed or omitted facts, or have provided false or misleading information concerning facts material to an application for insurance reimbursement or other benefits under such a policy.

138. These Defendants have acted or failed to act with the intent of defrauding or deceiving an insurer, a reinsurer, a producer, a broker or any agent thereof, to obtain insurance reimbursements under Medicaid, which is prohibited by RICO.

139. These Defendants have acted to assist, conspire with or urge other persons to commit acts or omissions through deceit, misrepresentation or other fraudulent means.

140. These Defendants have accepted proceeding or other benefits under policies of insurance (the MR/RD Medicaid waiver document), knowing that the proceeds or other benefits are derived from acts or omissions.

141. These Defendants have employed persons to procure clients, patients or other persons who obtain services or benefits under a policy of insurance (Medicaid) for the purpose of engaging in acts or omissions which violate the rights of the Plaintiffs.

142. Upon information and belief, Defendants Buscemi, Lacy, Huntress, Chorey and Johnson have acted in concert to manipulate or otherwise effect evaluations of medical necessity in violation of the South Carolina Medical Practice Act so as to deny payment for services which the treating physicians of the waiver participants have determined to be medically necessary.

143. The purposes of these evaluations conducted by Kathi Lacy, Judy Johnson and others under their supervision and control has been to deny needed Medicaid services and to defraud state taxpayers through the purchase and operation of WAC's, so as to financially exploit persons who have disabilities.

144. Plaintiffs are entitled to treble damages and Defendants should be required to repay all ill-gotten gains for debts "forgiven," real estate purchased with funds allocated to provide services to MR/RD Medicaid waiver participants and other improper uses of federal and state funds alleged herein.

145. Plaintiffs pray for payment of legal fees, costs and expenses of this action due to Defendants' violation of RICO.

PRAYER FOR RELIEF

Wherefore, the Plaintiffs and Class Members respectfully request that this Court:

1. Issue an order of protection prohibiting SCDDSN and its agents and employees from retaliating against the Plaintiffs or their families.

2. Assume jurisdiction over this action and maintain continuing jurisdiction until the Defendants are in full compliance with every order of this Court.

3. Issue an injunctive order declaring that Defendants' policies, practices, acts and omissions, as set forth above, violate Plaintiff's rights under the ADA and Section 504 of the Rehabilitation Act and the Medicaid Act.

4. Plaintiffs request an order prohibiting the Defendants from reducing ADHC services and requiring Defendants to provide such additional services as shall be medically necessary, as shall be determined by their treating physicians, so as to allow Plaintiffs and Class Members to live in the most integrated settings possible in order to prevent regression and to allow them to function with the most independence possible.

5. So long as the cost of these services is less than the cost of ICF/MR services, Plaintiffs and Class Members request that an order requiring Defendants to provide Medicaid waiver services as shall be determined by the treating physicians to be necessary absent review and an order from the Court during this litigation.[2]

6. Plaintiffs and Class Members request additional services which shall be determined to be just and appropriate by the Court.

7. Plaintiffs and Class Members request that this Court disgorge Defendants and their associated enterprises or organizations of ill gotten gains.

8. Plaintiff's request the relief requested in this complaint and such other relief as shall be

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[2] According to a 2006 audit by SCDHHS, CMS will allow waiver participants to receive services costing more than the "average" cost of care in a nursing home or an ICF/MR. However, for purposes of this Complaint, Plaintiffs and Class Members are requesting funding not to exceed the daily cost of care in a SCDDSN Regional Center.

determined by this Court to be just and equitable, including payment of legal fees and costs of this action.

9. Plaintiffs and Class Members request actual and punitive damages in such amount as shall be determined by a jury and such other relief as the Court shall determine to be just and right.

Respectfully submitted,

s/Patricia L. Harrison
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Columbia, South Carolina

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